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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 672

JOHN J. KRIEGER,

Petitioner,

vs.

THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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Respondent

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of said John J. Krieger for a review on writ of certiorari of the decision of the Supreme Court of the State of Louisiana respectfully shows:

Summary of Facts

Petitioner, John J. Krieger, was indicted by the Grand Jury for the Parish of Orleans, State of Louisiana, on May 21, 1946, for the crime of Forgery.

On October 23, 1946, and before trial on the merits of the charge of Forgery, petitioner filed a "Motion to Challenge and Set Aside the Jury Venire" (R. 13-14).

This motion was based on the fact that Petitioner, under the law of Louisiana, had a constitutional right to a trial by jury:

That, under the law, "trial by jury" imports an impartial jury selected from a cross-section of the community:

That such right to trial by jury therefore means that prospective jurors must be selected by officials (jury commissioners) without systematic and intentional exclusion of any substantial group in the community:

And that the jury commissioners, in selecting the jury list and venire, from which the jury must be (and was) chosen to try Petitioner, had systematically and intentionally excluded from said list and venire, all persons, and particularly white persons, who were wage earners.

The State of Louisiana "demurred" to this motion and challenge to the venire (R. 15) on three grounds: (1) That the motion was not timely filed under Article 202 of the Louisiana Code of Criminal Procedure; (2) That the motion failed to allege that fraud had been practiced in such selecting, or some great wrong committed thereby; and (3) That, in any event, the evidence failed to support the alleged exclusion.

Before proceeding to a trial on the merits of the charge of Forgery, a hearing was had, in the trial court, on the Motion and Challenge to the venire, after which the trial court ruled: (1) That Petitioner's motion and challenge to the venire had been filed too late; and (2) that, even if it had been filed timely, the evidence tendered in support of it failed to prove the charges therein made.

Petitioner reserved a Bill of Exceptions to the ruling of the trial court.

Thereafter, Petitioner was duly tried, convicted and sentenced on the charge of forgery and appealed from said conviction and sentence to the Supreme Court of Louisiana, which appeal is not yet officially reported but appears in Southern Reporter, advance sheets, January 29, 1948, at page 58 thereof.

The Supreme Court of Louisiana, after a hearing, affirmed Petitioner's conviction and sentence on November 30, 1947 (R. 84-88).

Thereafter, Petitioner applied for a rehearing, and same was denied by the Supreme Court of Louisiana on December 15, 1947.

Having exhausted all legal resources in the State of Louisiana, Petitioner filed Motion for Stay of Mandate in the Supreme Court of Louisiana on December 16, 1947, for the purpose of making this application, and same was granted.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the United States Judicial Code.

Petitioner, as said Motion to Challenge and Set Aside the Jury Venire shows, claims that he had a constitutional right, under the laws of Louisiana, to a jury trial.

The State of Louisiana concedes this point.

Petitioner, in said Motion to Challenge and Set Aside the Jury Venire, alleges that, in selecting the venire, the jury commissioners intentionally and systematically excluded white wage earners from the venire: thus depriving Petitioner of due process of law and the equal protection of the laws, under the Fourteenth Amendment to the Constitution of the United States of America.

Argument

The only question before the Court is, as to whether the evidence, adduced in the trial court, on the hearing of the Motion to Challenge and Set Aside the Jury Venire, does or does not support Petitioner's charge that he was deprived of his constitutional right to a jury trial, by the illegal procedure of the jury commissioners in systematically and intentionally excluding white wage earners from the jury venire, from which the trial jury was chosen.

We say, that is the only question because, although other issues were raised and passed on by the trial court, those other questions were ignored by the Supreme Court of Louisiana in its decision of this matter, as will appear from the Opinion (R. 84-88). And the court proceeded to pass squarely upon the merits of said Motion to Challenge, by declaring that the evidence adduced on the hearing of said motion, failed to support the charge therein.

We contend:

1. That Petitioner had a constitutional right to a jury trial and, therefore, that such jury trial was due process in this case.

2. That, in the absence of statute, authorizing a special method of selecting, or any special kinds of juries, the general rule is that, trial by jury necessarily contemplates an impartial jury drawn from a cross-section of the community.

3. That, in Louisiana, there is no law authorizing special methods of selection, or special kinds of juries, contrary to such general rule, and that the general rule governs in Louisiana.

4. That, in this case, the evidence shows that the jury commissioners systematically and intentionally excluded white wage earners from the venire, from which the jury to

try Petitioner was to be chosen and was chosen; and that, Petitioner's trial, conviction, and sentence thereafter, under those circumstances, was a deprivation of due process and equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States of America.

I

Petitioner Had a Constitutional Right to Trial by Jury

The Constitution of Louisiana (1921) Article VII, Section 41, provides as follows:

> "The Legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

The Petitioner was charged with the crime of Forgery. Article 72 of the Louisiana Criminal Code (Section 72 of Act 43 of 1942, Louisiana Legislature), provides:

> "Forgery is the false making or altering, with intent to defraud, of any signature to, or any part of, any writing purporting to have legal efficacy.
>
> "Issuing or transferring, with intent to defraud, a forged writing, known by the offender to be a forged writing, shall also constitute forgery.

> "Whoever commits the crime of forgery shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, for not more than ten years, or both."

It will thus be seen that forgery being punishable by imprisonment at hard labor, Petitioner had a constitutionally established right to a trial by jury, unless he waived same.

The transcript shows (R. 11-12) that a notation on the reverse of the indictment records the fact that Petitioner elected to be tried by a jury.

The State of Louisiana concedes Petitioner's right to a jury trial and we only refer to that right at this point for the reason that it is the necessary legal premise to Petitioner's argument, and to stress the fact that the said right is of a fundamental character deriving from the Louisiana Constitution itself.

II

General Rule and Its Exceptions

The general rule above referred to requires no lengthy discussion. It has been recently and solemnly declared by this Honorable Court in the case of *Thiel* v. *Southern Pacific Company,* to the effect that:

> "The American tradition of trial by jury, considered in connection . . . with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Citing Smith *v.* Texas, 311 U. S. 128, 85 L. Ed. 84, 86, 61 S. Ct. 164; Glasser *v.* United States, 315 U. S. 60, 85, 86, L. Ed. 680, 707, 62 S. Ct. 457. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional

exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Thiel v. *Southern Pacific Company*, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181.

And, with regard to exceptions to that general rule, this Honorable Court, in the case of *Fay* v. *New York*, 332 U. S., page 261, has held, in effect, that the general rule in question, applies, only in the absence of State statutes to the contrary.

The outstanding and distinguishing characteristic of the *Fay* case was, that a statute of the State of New York authorized the special method of selection and exclusion necessary to the formation of a special or "blue ribbon" jury.

III

Law of Louisiana Does Not Authorize Special or "Blue Ribbon" Juries

Unlike the State of New York, the law of Louisiana does not authorize or allow for the selection of special or "blue ribbon" juries.

The Constitution of Louisiana (1921) states that the legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil or criminal cases. We quote:

"The Legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the Dis-

trict Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Const. 1921, Article VII, Section 41.

In pursuance of that mandatory provision in the Constitution, the Legislature of the State of Louisiana has provided as follows:

"The qualifications to serve as a grand juror or a petit juror in any of the courts of this state shall be as follows:

"To be a citizen of this state, not less than twenty-one years of age, a bona fide resident of the parish in and for which the court is holden, for one year next preceding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, provided that there shall be no distinction made on account of race, color or previous condition of servitude; and provided further, that the district judge shall have discretion to decide upon the competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case.

"In addition to the foregoing qualifications, jurors shall be persons of well known good character and standing in the community."

La. Code of Criminal Procedure, Article 172, (Section 172 of Act 2 of 1928); also, Section 1 of Act 135 of 1898.

There are no other statutory provisions in the law of Louisiana bearing on the qualifications of jurors.

The above serves to show that there is no legal authority in Louisiana for such a discriminatory selection of a jury venire, as the Petitioner charged was done in this case.

The Supreme Court of Louisiana, in its Opinion, attempts to distinguish between "exclusion" of wage earners, and the "excusing" of wage earners.

We consider and discuss that alleged distinction, in another connection, later herein, but in connection with this part of the Petition we would like to point out at this time that there is nothing in the law, Constitution, or statutes of Louisiana which authorizes or allows the jury commission or jury commissioners to "excuse" "wage earners" in particular, or for that matter to "excuse" anyone from jury duty.

That, presumably, is a function of the Court itself. And it is a matter of common knowledge that the courts everywhere in this country exercise that function as one of the judicial prerogatives.

May we suggest that the Legislature intentionally withheld such power to excuse from jury commissioners because to confer such power would permit them to practice an unreasonable discrimination of every kind and character, and to a limitless extent.

We conclude, and submit, in view of the above, that even if we concede, for the sake of argument, that the Louisiana Supreme Court's "distinction", between "excusing" and "excluding," is sound, then the court's opinion is nevertheless erroneous, because, the "excusing" of wage earners by the jury commission or commissioners is just as unlawful and discriminatory as "excluding" wage earners. Each process is equally unauthorized and reprehensible to the law of Louisiana, and either one would offend against the

due process and equal protection provisions of the said Fourteenth Amendment as much as the other.

As was held in the case of *Fay* v. *New York*, 332 U. S. 261: "The function of this federal court under the Fourteenth Amendment in reference to state juries, is not to prescribe but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ."

As above stated, the State of Louisiana, by its Constitution and statutes has seen fit to withhold from jury commissions and commissioners the right or authority to "excuse" anyone from jury duty, yet the Supreme Court of Louisiana, in its Opinion herein, states that the jury commissioners did "excuse" wage earners, and attempts to justify that practice.

We submit that even if, for the sake of argument, we accept the terminology of the Louisiana Supreme Court and call the alleged "exclusion" of wage earners from the jury venire, merely an "excusing" of wage earners from the jury venire, nevertheless, since such "excusing" is not authorized by the law of Louisiana, the trial, conviction, and sentencing of Petitioner, under those circumstances, is violative of the provisions of the Fourteenth Amendment of the United States of America.

IV

The Evidence Shows That the Jury Commissioners Intentionally and Systematically Excluded White Wage Earners from the Jury Venire.

In support of the Motion to Challenge and Set Aside the Jury Venire, Petitioner offered the following evidence:

1. Testimony of Frank P. Krieger (R. 29-64).
2. Testimony of Petitioner, John J. Krieger (R. 64-65).

3. Exhibit D-1, Jury list of Trial Court, with 50 names (R. 73).

4. Exhibit D-2, Jury venire list, with 150 names, after it had been checked by Frank P. Krieger (R. 74-78).

5. Exhibit D-3, Jury venire list, before being checked by Frank P. Krieger, with 150 names (R. 79-83).

Frank P. Krieger testified (R. 29-64) that he was furnished with a copy of the jury venire list of 150 names by his brother, the Petitioner.

Frank P. Krieger testified that he checked these 150 names and investigated as to the occupations of those so named, and that the result of that investigation is shown on Exhibit D-2 (R. 74-78). The testimony of Frank P. Krieger is summarized by himself (R. 59) as follows:

"Q. Now, Mr. Krieger, on this list of 150 were you able, through the investigation that you have described, to ascertain how many, if any, white laborers or wage earners were listed on there?

"A. Not one.

"Q. And the only laborers or wage earners, from your investigation as you have described it that were contained in that list of 150, and also in that list of 50, with respect to which you have testified this forenoon, were of the colored race and those that you have testified to a few minutes ago?

"A. That is true with this possible exception. If Lamb is a laborer. Lamb is president of a union.

"Q. And that is a company union, isn't that correct?

"A. Yes."

The testimony of Frank P. Krieger shows positively that the venire list did not contain the name of a single white laborer.

With reference to the said testimony, the Supreme Court of Louisiana (R. 86) had this to say:

> "The only pertinent testimony produced in support of the motion was given by appellent's brother who stated, in substance, that he had made an investigation of the 150 names composing the venire from which the 50 petit jurors were drawn; that he found but few manual laborers included on the list and that all of those were colored men."

Then the Court continued immediately as follows:

> "This evidence, standing alone, cannot suffice to sustain the charge that the jury commission had systematically excluded white manual laborers from the list."

The record shows that the Court was and is mistaken in assuming that the evidence (testimony) of Frank P. Krieger stands alone in this respect.

The record (R. 79-83) shows Exhibit D-3 bearing on the point.

Exhibit D-3 is a copy of the 150 names on the jury venire list showing the occupations of the various persons thereon named.

Exhibit D-3 was introduced in evidence in connection with the testimony of Petitioner himself (R. 64-65) and fully corroborates the testimony of Frank P. Krieger (R. 29-64). It shows only one (1) named person listed as a laborer in all the 150 named, and it was with respect to that one that Frank P. Krieger testified as above that he was of the negro race.

This Exhibit D-3 not only successfully refutes the Court's assumption that Frank P. Krieger's testimony was the only evidence on the point, but it was the strongest kind of corroborative evidence because the original of the said list (D-3) was in the possession and under the control of

the State (Clerk of Court). This copy was admitted because the original wasn't offered by the State, and the record will show that the original venire list never was offered by the State to contradict the copy which was admitted.

We therefore say, that the State's own records corroborated Frank P. Krieger's testimony, which the Supreme Court of Louisiana states was the only evidence on the point.

The only testimony or evidence offered on behalf of the State was the testimony of Mr. J. H. Hogue, Chairman of the Jury Commission (R. 66-73).

Nowhere in Commissioner Hogue's testimony does he even pretend that the venire list contains the name of a single white laborer.

Commissioner Hogue's testimony is uncorroborated; at times it is evasive; at all times it is vague. And, as distinguished from that of Frank P. Krieger, whose testimony was positive and to the point, Commissioner Hogue's testimony is mainly of a negative character and respecting generalities.

Opinion may differ as to the extent that Commissoner Hogue's testimony contradicts that of Petitioner's witness, Frank P. Krieger. But the fact remains that whilst Frank P. Krieger's testimony is corroborated by the State's own records, the jury venire list above referred to, and to the extent that said list corroborates Frank P. Krieger's testimony, it contradicts and affects the reliability of Commissioner Hogue's testimony.

The trial Court and the Supreme Court have sought, as above related, to establish a distinction, of legal significance, between "excusing" and "excluding."

Strictly speaking, "excusing" is one method of "excluding". The fact that there are other methods does not

make it any the less such. Exclusion is the inevitable result of "excusing". And, when we find, as in this case, that, as the jury venire list (D-3, R. 79-83) shows that exclusion has resulted, there must have been an intelligence at work designed to secure the only result that could logically flow from the employment of such means.

Call it by whatever name one pleases, a rose by any other name is still the same. So, under the circumstances, the absence of any white laborers' names from the jury venire list is more than suspicious. It is more than suspicious additionally because it is incredible that in the City of New Orleans, with a population of approximately 500,000 people, a jury venire list of 150 names should be made up by the jury commission without containing the name of one single white laborer or wage earner, unless a policy of exclusion was followed.

In addition, and disregarding terminology, in favor of the substance and essence of things, regard this testimony of Commissioner Hogue (R. 72):

> "The Court:
>
> "Q. . . . it is the policy of excusing because of the nature of employment rather than excluding because of capacity or particular economic status of the individual?"

And what does Commissioner Hogue say? He says:

> "A. That's right."

Everyone is responsible for the natural and probable consequences of his acts. The above testimony indicates that the complete absence of the names of any white laborers (wage earners) from the venire list in this case was the natural and probable result of the policy above referred to in the commissioner's testimony.

Such complete absence of such names resulted in the exclusion complained of, and the jury commission was responsible for the exclusion complained of.

Commissioner Hogue says above, that the practice complained of was in line with the policy of the jury commission. Policy necessarily implies intent and system.

We are driven to the conclusion therefore, that the proven "exclusion" of white wage earners from the jury venire list herein arrived at by a "policy of 'excusing' ", was intentional and systematic, because an established policy necessarily implies intent and system designed to carry out that intent.

Throughout his testimony, Commissioner Hogue indicates, apparently as an excuse for the lack of names of white laborers on the venire list, that such persons generally desire and suggest being "excused". Does this legalize the "exclusion" complained of? We think not.

Under the law of Louisiana, as we have already stated, the jury commissioners were not authorized to excuse, under the circumstances. Still less were the prospective jury-men laborers entitled to be excused. It is immaterial whence the suggestion or inspiration for the "excusing" and resultant exclusion originated; Petitioner was entitled to due process of law and the equal protection of the law from the jury commission and commissioners. The latter were under a legal obligation to ensure and Petitioner had a constitutional right to obtain a trial by a jury selected from a cross-section of the community.

The exclusion complained of by petitioner is supported by the weight of the evidence, and operated toward depriving Petitioner of his liberty without due process and deprived him of the equal protection of the law.

WHEREFORE, Petitioner, John J. Krieger respectfully prays that the writ of certiorari be allowed, and that the decision of the Supreme Court of Louisiana herein be reviewed and reversed.

Dated, New Orleans, Louisiana, March 10, 1948.

MAURICE R. WOULFE,
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Counsel for Petitioner, John J. Krieger.

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